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February 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: File No. E-99-22 and CC Docket No. 99-354

Dear Ms. Salas:

The Massachusetts Department of Telecommunications and Energy ("DTE") has recently issued an order that highlights the need for prompt Commission action in the above-referenced dockets. Each matter relates to the same underlying problem: Global NAPs, Inc. ("Global NAPs") is being compelled to terminate billions of minutes of Bell Atlantic-Massachusetts' ("Bell Atlantic") traffic bound for Internet Service Providers ("ISPs") for free. The situation has resulted in a forced Fifty Million Dollar ($50,000,000) subsidy from Global NAPs, a small competitive local exchange carrier ("CLEC"), to Bell Atlantic, a multi-billion-dollar monopoly.

Global NAPs believes that its interconnection agreement with Bell Atlantic requires Bell Atlantic to treat ISP-bound calls on the same terms as purely "local" calls. It asked the DTE to decide this precise question in a complaint filed in April 1999. When the DTE did nothing about the complaint for some eight months, Global NAPs filed a petition (CC Docket No. 99-354) to

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preempt the DTE's jurisdiction over that dispute. Now, ten months after the complaint was filed (and roughly a year since Bell Atlantic stopped paying its bills), the DTE has dismissed the complaint as "moot," even though (a) it never decided the merits of the controversy; (b) Global NAPs has never been paid and continues to assert its right to payment; and (c) Bell Atlantic has not paid, and continues to dispute its obligation to do so.[1]

At the same time, the DTE affirmed its earlier non-decision (from May 1999) on the general question of compensation for ISP-bound calls. That earlier non-decision vacated an even earlier ruling calling for compensation. The May 1999 order affirmatively, and rather pointedly, refused to apply the logical, reasoned considerations for deciding whether compensation for ISP-bound calls is due under existing agreements, laid out by this Commission in the *Reciprocal Compensation Order*.[2] By refusing to apply these or any other legal standards to actually decide the dispute, the DTE abdicated its responsibility under Section 252 to decide what is required of parties to interconnection agreements that it has itself approved. It is this abdication of its duties that the DTE has just re-affirmed.

Global NAPs submits that the DTE is engaging in an "administrative law shell game" of exactly the type that was condemned by the D.C. Circuit in *AT&T v. FCC,* 978 F.2d 727, 731-32 (D.C. Cir. 1992), *cert. denied sub nom. MCI v. AT&T,*509 U.S. 913 (1993). There, the court found that the Commission, to avoid addressing a particular (and legally questionable) order, dismissed AT&T's complaint against MCI (which had relied on the questionable order), while deferring a resolution of the underlying controversy to a newly-established rulemaking. The Court held that this was improper because it avoided the Commission's obligation to decide the claims put before it in complaint cases.

Here, the DTE seems determined not to apply the logic of the Commission's *Reciprocal Compensation Order* to Bell Atlantic's existing agreement with Global NAPs. In order to avoid having either to apply that logic or to admit that it has unlawfully refused to do so, it has, as

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[1] A copy of this DTE order, issued February 25, 2000, is attached.

[2] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Feb. 26, 1999) ("*Reciprocal Compensation Order*") at ¶¶ 22-27. There can be no reasonable question that compensation for ISP-bound calls is due to Global NAPs under this standard. The agreement was negotiated in the context of this Commission's longstanding policy of treating ISP-bound calls as local in various respects. Nothing in the agreement singles out ISP-bound calls for any type of special treatment. Bell Atlantic bills its end users local rates for calls to ISPs. Bell Atlantic accounts for the costs and revenues associated with ISP-bound calling as intrastate. There is no provision in the agreement for compensation for ISP-bound calls if they are not treated as local. Consequently, unless ISP-bound calls were treated as local under the agreement, Global NAPs would be economically unable to compete for the business of ISPs, thereby frustrating the pro-competitive purposes of the 1996 Act. The actual determination on this point, however, can be made after the Commission formally preempts the DTE.

noted above, dismissed Global NAPs' complaint as moot, even though there is no conceivably rational grounds upon which such a finding could be based. The DTE's dismissal is blatantly and wholly pretextual. Consequently, the Commission may rest assured, at this point, there is no hope that the DTE will actually fulfill its responsibility to decide the controversy between Global NAPs and Bell Atlantic.

This latest DTE action is relevant both to the ongoing preemption proceeding (CC Docket No. 99-354) and to the pending reconsideration of the Commission's order granting Bell Atlantic's complaint against Global NAPs' ISP-traffic tariff in File No. E-99-22.

In the former case, the DTE originally implied in its comments that the preemption petition was "premature" because the DTE could be expected to decide the underlying dispute in the near future, either in Global NAPs' specific case or in the DTE's "generic" docket on this topic. The DTE's new ruling makes clear that no such decision will be forthcoming. The DTE's original ruling on this topic, from October 1998, has been vacated (because it supposedly relied on the discredited "two-call theory"). But no new substantive ruling on whether existing interconnection agreements contemplate compensation for ISP-bound calls has been, or will be, made. The issue is simply in limbo. And in the case of Global NAPs' specific complaint against Bell Atlantic, it cannot possibly be clearer that the DTE has refused, and will continue to refuse, to decide the simple question of whether the parties' interconnection agreement, judged by the logical and reasonable standards laid out in the *Reciprocal Compensation Order,* contemplates payment for ISP-bound calls or not. Any "prematurity," therefore, has vanished. Preemption by this Commission under Section 252(e)(5) is now plainly mandatory.[3]

In the complaint case against Global NAPs' tariff, now on reconsideration, the Commission purported to decide the matter on grounds not raised by Bell Atlantic, violating both due process and its obligation to address complainants' actual claims. *See AT&T v. FCC, supra.* But putting that question aside, it is clear from the Commission's decision that one reason the Commission felt comfortable denying Global NAPs compensation for ISP-bound calls under the tariff was its belief that the DTE would decide the contract dispute in due course. *See, e.g., Bell Atlantic v. Global NAPs, Memorandum Opinion & Order,* FCC 99-381 (released December 2, 1999) at ¶ 12 & nn. 40-41. While hardly a justification for the Commission's due process and other legal violations in that order, Global NAPs can imagine the Commission making a practical judgment that if Global NAPs was going to get paid anyway, under a soon-to-be-released order from the DTE, any legal difficulties with its own order would become moot. Now, however, the

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[3] The Commission is bound under Section 252(e)(5) to consider the substance of the situation, not merely its form. It would be the height of absurdity to suggest that the mere fact that the DTE has — with not a shred of legal or factual analysis — declared the Global NAPs/Bell Atlantic controversy "moot" and washed its hands of it means that the "matter" between the two carriers no longer exists, or is somehow no longer the responsibility of the DTE. Under such a rule Section 252(e)(5) would become a dead letter, since any time a state commission wanted to avoid preemption it could simply issue a pretextual order of dismissal, since as the one that has been issued here.

DTE has made clear that it will not even decide the question of compensation on the merits, much less issue an order that calls for payment. Therefore, to the extent that the Commission indeed made a practical judgment that the DTE would make this problem go away (as far as the Commission is concerned), that judgment has been proven false by events. This provides an additional reason to grant Global NAPs' pending motion for reconsideration in File No. E-99-22.

For all these reasons, Global NAPs submits that the DTE's recent decision, which amounts to a complete abdication of its obligation to decide what the parties' interconnection agreement means, simultaneously supports Global NAPs' request for reconsideration in File No. E-99-22 and its petition for preemption in CC Docket No. 99-354.

Please do not hesitate to contact me if you have any questions or if I can be of any assistance. My direct dial is 202-828-9811, and my email address is chris.savage@crblaw.com.

Respectfully submitted,

Christopher W. Savage
Counsel for
GLOBAL NAPS, INC.

cc: Attached service list

D.T.E. 97-116-D

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

D.T.E. 99-39

Complaint of Global NAPs, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for declaratory relief with respect to reciprocal compensation.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND DISMISSING GLOBAL NAPS COMPLAINT

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I. INTRODUCTION

On May 19, 1999, the Department issued MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-C ("D.T.E. 97-116-C") and vacated its prior Order in D.T.E. 97-116 (1998). D.T.E. 97-116-C vacated our earlier order requiring New England Telephone and Telegraph Company, d/b/a Bell Atlantic - Massachusetts ("Bell Atlantic") to make reciprocal compensation payments for traffic terminated by Competitive Local Exchange Companies ("CLECs") to Internet Service Providers ("ISPs") on the terms there stated. D.T.E. 97-116-C at 19-31.

On June 8, 1999, Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies, and AT&T Communications of New England, Inc. (collectively "AT&T") filed a joint Motion for Reconsideration or, in the Alternative, for Clarification of D.T.E. 97-116-C ("AT&T Motion"). Pursuant to a schedule established by the hearing officer, additional motions for reconsideration and/or comments in support of AT&T's Motion were filed by the following parties: Global NAPs, Inc. ("GNAPs"); Sprint Communications Company L.P. ("Sprint"); Conversent Communications of Massachusetts, LLC ("Conversent")[1]; RNK, Inc. d/b/a RNK Telecom ("RNK"); MCI WorldCom, Inc., WorldCom Technologies, Inc., and MCI Metro (collectively "MCI WorldCom"); and jointly by RCN-BecoCom, LLC, Level 3 Communications, Inc., Focal Communications Corporation, Choice One Communications, Inc., CoreComm Limited and CoreComm Massachusetts, Inc.

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[1] Conversent Communications of Massachusetts, LLC was formerly known as NEVD of Massachusetts, LLC.

(collectively, "RCN"). On August 5, 1999, Bell Atlantic submitted a consolidated response to all motions and comments.

In a related action, on April 16, 1999, GNAPs filed a Motion for Complaint against Bell Atlantic, seeking a declaratory ruling from the Department that, under the terms of the parties' interconnection agreement, Bell Atlantic must pay GNAPs reciprocal compensation for the termination of ISP-bound traffic. The Department docketed the matter as D.T.E. 99-39. On April 30, 1999, Bell Atlantic filed an Answer to the Motion for Complaint and a Counter-Claim. On May 14, 1999, GNAPs filed an Answer to Bell Atlantic's Counter-Claim.

II. STANDARD OF REVIEW

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the

first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous so as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. CLECS

1. AT&T

AT&T argues that the Department should reconsider its decision in D.T.E. 97-116-C because the Order appears to have been the result of mistake or inadvertence (AT&T Motion at 3). AT&T states that the Department provided Bell Atlantic with exactly the relief it sought even though the Department "expressly stated that it did not intend to decide the merits of the

dispute"(id. at 3, 5-7). According to AT&T, reconsideration is appropriate where "parties have not been 'accorded a reasonable opportunity to prepare and present evidence and argument' on an issue decided by the Department" (id. at 4, quoting CTC Communications Corp., D.T.E. 98-18-A at 2, 9 (1999)). Since the carriers affected by the Department's decision in this case did not have the opportunity to present evidence and argument on all of the issues decided, or to subject Bell Atlantic's affiants to cross-examination, AT&T argues that reconsideration is warranted (id. at 4-5). In particular, AT&T notes that the Department construed only the terms of the MCI WorldCom -- Bell Atlantic interconnection agreement (id. at 6, citing D.T.E. 97-116-C at 25 n.27). Thus, AT&T states that it must be afforded the opportunity to present evidence and argument concerning the intent of the contracting parties in its interconnection agreement with Bell Atlantic and that the Department's failure to do so is arbitrary and capricious (id. at 7-8).

AT&T further argues that mistakes of fact and law underlie D.T.E. 97-116-C and support its request for reconsideration (id. at 8-13). Specifically, AT&T argues that the Department disregarded undisputed evidence that Bell Atlantic understood, at the time of contracting, that ISP-bound traffic was treated as local and, therefore, subject to contractual obligations to pay reciprocal compensation (id. at 8).[2] In addition, AT&T argues that D.T.E. 97-116-C erroneously ignored Bell Atlantic's contractual duty to attempt to negotiate new terms before coming to the Department for relief (id. at 8-9). According to AT&T, such

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[2] As an example of such "undisputed evidence," AT&T points to Bell Atlantic's formal May 30, 1996 Reply Comments filed in In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98.

an obligation means that "the Department had no jurisdiction to grant the relief sought by Bell Atlantic" (id. at 9). Finally, AT&T argues that the Department could not lawfully reach a conclusion that some CLECs and ISPs "gam[ed] regulation" to increase profits or lower Internet access costs without evidence and argument concerning what would constitute "real competition" for ISP customers (id. at 10-13).

AT&T also argues that new guidance from the Federal Communications Commission's ("FCC") Common Carrier Bureau[3] confirms that the Department misapplied the Internet Traffic Order[4] (id. at 13-14). According to AT&T, this guidance demonstrates that the FCC continues to "treat ISPs as end-users and to treat ISP-bound traffic as local for the purposes of inter-carrier compensation" (id. at 13). Thus, AT&T argues that "[s]ince the costs of ISP-bound traffic continue to be classified as intrastate in nature, notwithstanding the FCC's exercise of jurisdiction over such traffic, there is no basis for the Department's conclusion that ISP-bound traffic must necessarily fall outside the scope of provisions in interconnection agreements that require Bell Atlantic to pay reciprocal compensation for local traffic" (id. at 13-14).

Finally, AT&T argues that the Department erred in concluding that an imbalance in traffic flows necessarily meant that CLECs were "gaming" the regulatory system or taking

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3 AT&T Motion at Exh. A (Letter from Lawrence E. Strickling, Chief, FCC Common Carrier Bureau to Dale Robertson, SBC Communications, Inc., May 18, 1999, Re: Separations Treatment of ISP-Bound Traffic).

4 In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order") and Inter-Carrier Compensation for ISP-bound traffic, CC Docket No. 99-68 Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM").

advantage of a regulatorily-engendered distortion that had to be eliminated by Department "fiat" (id. at 14-17). According to AT&T, the Department's adoption of the reciprocal compensation system rather than the bill-and-keep method was explicitly premised on the fact that there would not be a balance of traffic between carriers (id. at 13, citing Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Phase 4, at 66-67 (1996)). Thus, in AT&T's opinion, the Department's conclusion that the existence of asymmetrical traffic patterns and the resulting asymmetries in reciprocal compensation amounted to an "unintended arbitrage opportunity" constituting the "antithesis" of "real competition" was unfair, and without basis (id. at 15).[5]

AT&T also suggests, in the event the Department decides not to reconsider D.T.E. 97-116-C, that clarification of the operation of the 2:1 ratio be provided because the relevant ordering clause was ambiguous (id. at 16-17). According to AT&T, that ordering clause may be read as authorizing Bell Atlantic to withhold all reciprocal compensation in the event the terminating-to-originating traffic ratio exceeds a 2:1 ratio, rather than merely withholding payment on only the portion of such traffic that exceeds such a ratio (id.).

2. RCN

RCN urges that the Department reconsider D.T.E. 97-116-C because (1) it is premised on a misreading of the record; (2) it improperly applies the FCC's decision in that

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[5] AT&T notes that wireless traffic is typically originated by a customer of a wireless service provider but terminated to a Bell Atlantic customer. Thus, such traffic is an example of an imbalanced traffic flow that Bell Atlantic does not protest because the associated reciprocal compensation payments run in its favor. According to AT&T, Bell Atlantic does not suggest that such a situation constitutes an "unfair distortion of 'real competition'" (id. at 15-16).

Commission's Internet Traffic Order; and (3) D.T.E. 97-116-C substantially impairs the development of advanced telecommunications services in the Commonwealth (RCN Motion at 2) . According to RCN, a close reading of D.T.E. 97-116 indicates that it was not, in fact, based solely on a two-call premise, but rather that it addressed the applicability of reciprocal compensation to ISP-bound calls with respect to the specific definition contained in the Bell Atlantic/MCI WorldCom interconnection agreement (id. at 3). RCN argues that in analyzing that agreement and the intent of the parties, the Department noted that (1) the agreement's "local call" definition contained no exception for ISP-bound traffic; (2) the characteristics of calls to ISPs are identical to local calls; (3) ISPs have local telephone numbers; (4) LECs charge their customer's local rates for calls to ISPs; and (5) the ISPs facilities are located within the local access and transport area ("LATA") (id., citing D.T.E. 97-116, at 11-12). Given this prior analysis, RCN argues that it is unreasonable for the Department to now resolve the dispute "on the unsupported premise that it interpreted the agreement solely on the basis of the two-call theory" (id. at 4-5). RCN also argues that D.T.E. 97-116-C misapplies the FCC's Internet Traffic Order because that order clearly envisions that states would have an ongoing role in establishing and enforcing compensation provisions for ISP-bound calls (id. at 5). Since states continue to have such a role, RCN argues that a Department Order leaving matters unresolved is neither required nor appropriate (id. at 6).

Finally, RCN argues that in enabling Bell Atlantic to cease payments to CLECS above a traffic imbalance ratio of 2:1, the Department improperly revised the parties' interconnection agreement (id.). According to RCN, Bell Atlantic was paying reciprocal compensation for the

termination of traffic, including calls to ISPs, before the Department issued D.T.E. 97-116 (id.). Thus, the Department's vacatur of that Order means that Bell Atlantic should have been required to continue such payments until the dispute was resolved (id. at 7).

3. MCI WorldCom

MCI WorldCom makes many of the same arguments as AT&T and RCN. Specifically, MCI WorldCom states that it was improper for the Department to grant Bell Atlantic the full relief requested without considering or hearing evidence or argument on all relevant contractual and public policy issues (MCI WorldCom Motion at 3-8). Moreover, MCI WorldCom argues that D.T.E. 97-116-C is focused inappropriately upon the FCC's finding that ISP-bound traffic should be treated as interstate and ignores the fact that interstate treatment will not commence at the federal level until after the FCC has completed its rulemaking (id. at 4). Thus, MCI WorldCom states that this "failure has created an anomalous and inequitable situation under which [it] incurs the costs associated with the termination of ISP-bound calls originated by Bell Atlantic customers, but receives no compensation for doing so" (id. at 5).

MCI WorldCom also argues that the Department's failure to address the contract issues presented strays from the very task which was presented in the original complaint involving its predecessor-in-interest, MFS Intelenet Service of Massachusetts, Inc. (id. at 6). According to MCI WorldCom, its interconnection agreement requires reciprocal compensation for local traffic as defined in that agreement (id. at 6). MCI WorldCom states:

> The agreement treated as local traffic the type of traffic which Bell Atlantic itself treated as local traffic under its tariffs. It was clear to both parties at the time that Bell Atlantic's customers called ISPs using local telephone services out of the local telephone tariff of Bell Atlantic, that Bell Atlantic billed its customers local charges for these calls, and the Bell Atlantic accounted for and reported network usage associated with these calls as local as well. . . . None of these circumstances and practices have changed as a result of the FCC's Internet Traffic Order. The FCC's Internet Traffic Order was nothing more than a jurisdictional analysis and did not require any change in Bell Atlantic's treatment of ISP-bound calls under any of its tariffs or agreements.

(id.).

As argued by AT&T, MCI WorldCom also points to new guidance from the FCC's Common Carrier Bureau[6] as confirmation that the Department misapplied the FCC's ISP jurisdictional decision by using it as a basis for denying it any compensation for the termination of ISP-bound traffic pending further action by the FCC (id. at 8-9). Moreover, MCI WorldCom also contends that the Department improperly relied upon affidavits submitted by Bell Atlantic without giving other parties a fair opportunity to respond to or to examine such evidence (id. at 11).

MCI WorldCom states that the Department erroneously disregarded Bell Atlantic's contractual obligation to negotiate before asking for a vacatur of D.T.E. 97-116 (id. at 9). In addition, MCI WorldCom argues that the Department had no basis for effectively setting the reciprocal compensation rate for ISP-bound traffic to zero, especially without taking evidence and considering argument about the proposed levels of inter-carrier compensation (id. at 10-11). According to MCI WorldCom, for some CLECs, compensation delayed equals compensation denied. MCI WorldCom buttresses this argument by quoting the Department's

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[6] MCI WorldCom Motion at Exh. A; see footnote 2, supra, and associated text.

statement in D.T.E. 97-116-C at 28-29 that "there were and may still be costs incurred by local exchange carriers in terminating [ISP-bound] traffic" (id. at 11). Thus, MCI WorldCom argues that the Department should reconsider D.T.E. 97-116-C in light of new information that compensation arrangements have not been achieved through negotiation after nearly [five] months and the Department's mistaken belief that negotiated compensation arrangements would avoid the untenable situation of CLECs terminating large volumes of Bell Atlantic originated traffic for free (id.).

Finally, MCI WorldCom argues that the Department's decision to do away with reciprocal compensation for ISP-bound traffic because of a traffic imbalance was arbitrary or capricious (id. at 12). According to MCI WorldCom, the Department required reciprocal compensation instead of bill-and-keep based on a finding that there would not be a balance of traffic between carriers (id. at 12-13, citing Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 4 Decision at 66-67 (1996)). MCI WorldCom notes that it does not appear as if the Department considered the relationship between the issue of local service market entry and the termination of ISP-bound traffic by CLECs (id. at 14). In MCI WorldCom's view, it is not uncommon for market entrants to establish serving arrangements which will enable it to establish bases of revenue to help support expansion (id.). Thus, CLECs have competed for and obtained the right to serve ISP end users (id.). Instead of considering this type of information and recognizing that the mix of a CLEC's traffic will change over time as it has the opportunity to develop a customer base (an opportunity slowed by the lack of number portability and telephone numbering resources, inefficient OSS and

other provisioning issues), MCI WorldCom contends that the Department singled out the termination of ISP-bound traffic by CLECs, including MCI WorldCom, and based its decision on incomplete information (id. at 14-15).

4. RNK

RNK submitted comments in support of AT&T's Motion. According to RNK, the Department erred in granting Bell Atlantic the full relief requested without first voiding D.T.E. 97-116 and, second, allowing [a]ffected parties an opportunity to present evidence and be heard (RNK Comments at 1). Starting a new investigation, RNK argues, would have accorded all parties sufficient due process to present evidence relevant to issues such as, but not limited to, the specific wording of individual interconnection agreements, lack of notice, intent of the parties, trade practices, and the subsequent actions of the parties (id. at 2).

RNK further contends that D.T.E. 97-116-C strengthens the hand of Bell Atlantic in its negotiation of reciprocal compensation payments for ISP-bound traffic (id. at 2-3). Accordingly, RNK states that if the Department truly desires a settlement of this issue through substantive negotiations, it should reverse the portions of D.T.E. 97-116-C that grant Bell Atlantic relief from the obligation to pay reciprocal compensation for ISP-bound traffic (id. at 3).

Similar to the arguments of other CLECs, RNK states that the D.T.E. 97-116-C is arbitrary, capricious and unclear because it incorrectly sets the inter-carrier compensation rate for ISP-bound traffic at zero, and adopts the "2-1" ratio proposed by Bell Atlantic without any substantive basis (id. at 4-5).

5. Conversent

Conversent supports the argument made in AT&T's Motion but does not repeat them (Conversent Motion at 1). Instead, Conversent expounds two additional bases for reconsideration of D.T.E. 97-116-C.

First, Conversent argues that D.T.E. 97-116-C is harmful to competition and harmful to small companies investing in Massachusetts. Conversent avers that it has invested over four million dollars in order to provide local exchange services to its customers (id.). Thus, to the extent that Conversent is successful in acquiring ISPs as customers, that it will be in the position of subsidizing the incumbent monopoly's operations by terminating calls that originate on its (i.e., Bell Atlantic's) network for free (id. at 1-2).

Second, Conversent contends that the Department should construe its interconnection agreement with Bell Atlantic with reference to the intent of the parties to it (id. at 2-4, quoting Internet Traffic Order at ¶ 24 ("When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. . . . [S]tate commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions.")).

6. GNAPs

GNAPs submitted comments in support of those parties seeking reconsideration of D.T.E. 97-116-C. Rather than restating the arguments put forth by the movants, GNAPs makes two main points.

First, GNAPs states that the Department's economic analysis as provided in D.T.E. 97-116-C is faulty because "[f]ar from creating an arbitrage opportunity, setting the price for call termination at the level of cost the originating LEC incurs sends exactly the right price signal to the market: firms that are more efficient than the ILEC will enter the market and gain customers; firms that are not will not" (GNAPs Comments at 3).[7] Furthermore, according to GNAPs:

> Focusing on the long holding times associated with ISP-bound calls, as Bell Atlantic is wont to do, is a red herring. Unless there is a separate originating rate for ISP-bound calls, those calls are simply a particular subset of the class of "local" calls. As long as Bell Atlantic's average revenue for all local calls covers the average cost of all such calls - including 30-minute calls to ISPs and 30-second calls to answering machines - the fact that ISP-bound calls tend to be long is of no more significance than the fact that many teenage-girl-bound calls tend to be long as well. Neither sub-set of local calls is separately priced on the originating end, so there is no logical basis for treating them differently at the terminating end

(id. at 4 n.6).

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[7] According to GNAPs, this arrangement is, in economic terms, a price cap system under which the CLEC's compensation for performing terminating switching is capped at the ILEC's cost of performing that same function, and, for the same reasons as a price cap, provides the appropriate incentives for CLEC's to improve efficiency (id. at 3 n.5).

Since ISPs are exempt from paying interstate access charges,[8] the end result of the Department's decision, GNAPs argues, is that CLECs will have to set prices for their ISP services high enough to recover terminating switching costs from the ISPs themselves (id. at 4). However, such pricing means that no CLEC will be able to compete against the ILEC because the ILEC may recover terminating switching costs from charges to the end users who are calling the ISPs, while CLECs can not do so (id.). The only possible economic effect of this regime, in GNAPs' opinion, is to force ISPs away from CLECs (who will have to charge them more than Bell Atlantic charges them) and back to Bell Atlantic (id.). GNAPs states that "[t]here is no conceivable public policy basis for depriving Massachusetts ISPs of the benefits of competition, yet that is exactly the effect that the Department's order will inevitably have" (id.).

Second, GNAPs argues that D.T.E. 97-116-C is itself legally and procedurally flawed because it is based on a mistaken interpretation of the Internet Traffic Order. According to GNAPs, the FCC had never previously held that ISP-bound traffic was local, thus, the Department's statement that its prior ruling in D.T.E. 97-116 had been "compelled" was erroneous (id. at 5). Rather, GNAPs argues that D.T.E. 97-116 recognizes the jurisdictional

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[8] In order to recover the costs of providing interstate access services, ILECs charge inter-exchange carriers in accordance with the FCC's access charge rules. The FCC has repeatedly found that calls to enhanced service providers ("ESP") (ISPs are a subset of ESPs) are jurisdictionally interstate but should be treated as though they were local. NARUC v. FCC, 737 F.2d 1095, 1135-1137 (D.C. Cir. 1984) (upholding initial "ESP Exemption" from access charges); Southwestern Bell v. FCC, 153 F.3d 523 (8th Cir. 1998). Accordingly, ESPs are exempt from paying access charges to the ILECs. Instead, ISPs purchase intrastate-tariffed local exchange services so that customers may reach them by means of a local call.

nature of ISP-bound traffic as interstate yet required reciprocal compensation as if it was "local" (id.). In GNAPs' opinion, D.T.E. 97-116-C ignores the crucial question of contract interpretation, i.e., what did the individual parties to the interconnection agreements intend, and eliminates Bell Atlantic's obligation for compensating its competition for terminating and transporting certain traffic (id. at 6).[9]

7. Sprint

Sprint argues that reconsideration of D.T.E. 97-116-C is warranted because the decision was the result of mistake or inadvertence (Sprint Motion at 2). According to Sprint, the Internet Traffic Order grants states latitude to treat ISP-bound traffic as local for compensation purposes (id. at 3). Thus, in Sprint's opinion, the Department was under no obligation to nullify D.T.E. 97-116, and its decision to do so was the result of a mistake (id. at 3-5). Finally, Sprint urges the Department to maintain the reciprocal compensation mechanism for calls delivered to ISPs until another form of compensation is mandated by the FCC or the Department (id. at 5).

B. Bell Atlantic

Bell Atlantic submitted a consolidated response to all submitted motions and comments. In sum, Bell Atlantic argues that all of the motions fail to meet the Department's standard for reconsideration or clarification because they offer nothing new (Bell Atlantic Response at 1). Other than re-arguments of issues considered and decided by the Department in

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[9] On April 16, 1999, GNAPs filed a complaint against Bell Atlantic alleging that Bell Atlantic has breached the terms of their interconnection agreement by failing to pay reciprocal compensation for traffic originated on Bell Atlantic's network and terminated by GNAPs to its ISP customers. This matter was docketed as D.T.E. 99-39.

D.T.E. 97-116-C, Bell Atlantic states that the only allegation of "new" evidence presented by the movants is the guidance regarding separations treatment of ISP-bound traffic from the FCC's Common Carrier Bureau[10] (id. at 3). However, according to Bell Atlantic, this guidance letter affirms that ISP-bound traffic is largely interstate in nature and does nothing to undercut the Department's determination (id. at 4). Finally, Bell Atlantic argues that the submitted motions are based on the incorrect premise that D.T.E. 97-116-C made final determinations as to the merits of specific disputes that may be brought to the Department in the future (id.). While Bell Atlantic does recognize the "substantial policy guidance" contained in the Order, Bell Atlantic contends that such guidance neither undercuts the carrier's negotiating ability nor improperly decides issues that may be raised at a subsequent time (id. at 5). Rather, Bell Atlantic argues that the guidance should lead the parties to reasonable positions that properly account for the Department's policy positions in the event dispute resolution is required (id. at 5-6).

IV. ANALYSIS AND FINDINGS

For the reasons that follow, we hereby affirm the result of D.T.E. 97-116-C and deny all Motions for Reconsideration of that Order.[11] None of the movants' arguments present us

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[10] See footnote 3, supra.

[11] As Bell Atlantic understands that the Ordering clause of D.T.E. 97-116-C authorizes it to withhold reciprocal compensation payments only for traffic in excess of a 2:1 terminating-to-originating ratio, the Motions seeking clarification of this issue are moot (Bell Atlantic Comments at 4-5). In addition, as a final Order, D.T.E. 97-116-D may be appealed in accordance with applicable law. Thus, we do not need to address the remainder of MCI WorldCom's Motion for Extension of Time for Filing Reconsideration and of the Appeal Period of D.T.E. 97-116-C, submitted on May 28,

(continued...)

with the "extraordinary circumstances" necessary before we will take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987). We have recognized "extraordinary circumstances" in two situations: (1) when a motion for reconsideration brings to light previously unknown or undisclosed facts which, if known, would have had a significant impact upon the decision already rendered; and (2) when argument contained within a motion for reconsideration demonstrates that the Department's treatment of an issue was the result of mistake or inadvertence. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 4-5 (1983). The CLECs use both bases as vehicles to attack the result of D.T.E. 97-116-C.

With respect to the first prong of the CLECs' argument, we note that the motions for reconsideration and the comments previously submitted pertinent to our prior Orders have been extensive. After reviewing them, we conclude that the only arguably new fact is that the FCC's Common Carrier Bureau treats ISP-bound traffic as local for separations (i.e., jurisdictional accounting) purposes. However, relief from D.T.E. 97-116 was premised on the fact that the FCC's one-call analysis fatally undercut the two-call basis (the express and

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[11](...continued)
1999, and deferred pursuant to the ruling of the Hearing Officer issued on July 1, 1999.

exclusive basis) of the Department's previous analysis. See D.T.E. 97-116-C at 22-25, 38. This conclusion is not upset by accounting norms. Accordingly, we conclude that this fact, if known prior to the issuance of D.T.E. 97-116-C, would not have had a significant impact upon the decision already rendered.

As noted above, the CLECs also contend that our decision in D.T.E. 97-116-C was the "result of mistake or inadvertence." We disagree. Our finding in D.T.E. 97-116 that ISP-bound calls were "local" within the meaning of that term as used in interconnection agreements was based on the conclusion that such traffic was jurisdictionally local because the communication appeared to be severable into two components.[12] D.T.E. 97-116, at 11-13. The FCC's Internet Traffic Order demonstrated the unsoundness of that earlier legal reasoning and necessitated vacating D.T.E. 97-116. D.T.E. 97-116-C at 19-25.

We do not doubt that LECs incur real costs in routing traffic across the public-switched telephone network to its ultimate Internet destination via the facilities of an ISP and the routers, backbone, and connections of the Internet network. D.T.E. 97-116-C at 28-29. But consonant with the FCC's express doubts on this point, we view the recovery of such costs through the payment of reciprocal compensation (as currently priced) as economically efficient, because "efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures [e.g., current reciprocal compensation rates]." Internet Traffic Order at ¶ 29. Given the variety of possible commercial arrangements

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[12] We note that this decision was reached based on the comments and argument of the original parties to D.T.E. 97-116 -- parties who voluntarily relinquished their right to an evidentiary hearing. D.T.E. 97-116 at 2, n.7.

between LEC and ISP, the FCC tentatively concluded that a negotiation process, driven by market forces, was more likely to lead to efficient outcomes than are rates set by regulation. Id. We concurred with this conclusion and suggested that the parties in this matter pursue that course of action rather than renewing their quarrel over the payment of reciprocal compensation. D.T.E. 97-116-C at 27-31. We reaffirm that conclusion and reiterate that suggestion today.

As matters have transpired in the interim, negotiation has bourne commercial fruit in two instances.[13] The Department would prefer to see negotiated amendments to all of the interconnection agreements at issue here. As a general rule, it is better -- far better -- for businesses, rather than regulators, to reach commercial decisions. In order to facilitate such a result, we previously offered to provide a mediator, pursuant to the mediation provision of § 252(a)(2) of the Telecommunications Act of 1996. D.T.E. 97-116-C at 30. We renew that offer here. However, we wish to make clear that our proffered mediation should not viewed (1) as an opportunity to reargue the applicability of reciprocal compensation to ISP-bound traffic, nor (2) as an opportunity to establish an inter-carrier compensation mechanism based

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[13] Two companies, Level 3 Communications, Inc. ("Level 3") and PaeTec Communications, Inc. ("PaeTec"), have negotiated amendments to their interconnection agreements with Bell Atlantic for a new class of traffic to be called "compensable Internet traffic." The rate will be $0.003/minute declining to $0.0015/min depending on Bell Atlantic meeting some provisioning metrics. After July 2000, "compensable Internet traffic" in excess of a 10:1 ratio will be paid at a $0.0012/min rate. The rates established in these agreements will be in effect for three years. The agreements include compensation for historical traffic at $0.003/minute back to February 1, 1999. Terms of compensation for traffic prior to that are undisclosed at this time. The Department approved the Level 3 amendment on October 29, 1999 and the PaeTec amendment on November 23, 1999.

on Bell Atlantic's avoided cost. Rather, consistent with the command of 47 U.S.C. § 252(d)(2)(A)(i), our mediation efforts would focus on helping CLECs determine their own transport and termination costs for ISP-bound traffic.[14]

We recognize that the FCC's NPRM concerns the appropriate permanent compensation mechanism for ISP-bound traffic. At this juncture, it is impossible for us to speculate on how comprehensive the results of that proceeding will be: possibilities range from comprehensive and preempting rules that leave no independent state authority, to mere guidance for state commissions to follow as they implement their several policies. Accordingly, in the event the FCC's final pronouncement leaves issues to our determination, the Department may open an appropriate proceeding. In the meantime, we deny the motions for reconsideration or, in the alternative, for clarification of D.T.E. 97-116; reaffirm our Order in D.T.E. 97-116-C; and reiterate our offer of mediation service in cases where negotiations have not led to the contracting parties' accommodating the results and guidance of D.T.E. 97-116-C.

In addition, we hereby dismiss as moot the Motion for Complaint of GNAPs in D.T.E. 99-39. As noted above, in its Motion for Complaint, GNAPs sought a declaratory ruling from the Department that, under the terms of its interconnection agreement with Bell Atlantic, GNAPs should be compensated for terminating ISP-bound traffic from Bell Atlantic customers. The operative provisions of GNAPs' agreement (i.e., the definition of local traffic and the payment of reciprocal compensation) are in all material respects the same as the provision in the MCI WorldCom agreement, which were the subject of the dispute in this proceeding

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[14] See footnote 13, supra.

(D.T.E. 97-116). In that we have reaffirmed, above, our Order in D.T.E. 97-116-C concerning this very subject, we find that the GNAPs Motion for Complaint is moot.[15]

V. ORDER

Accordingly, after due notice and consideration, it is hereby

ORDERED: That all Motions for Reconsideration or, in the Alternative, for Clarification of D.T.E. 97-116-C (including comments filed in support) submitted by AT&T Communications of New England, Inc.; Choice One Communications, Inc.; Conversent of Massachusetts, LLC; CoreComm Limited; CoreComm Massachusetts, Inc.; Focal Communications Corporation; Global NAPs, Inc.; Level 3 Communications, Inc.; MCI Metro; MCI WorldCom, Inc.; RCN-BecoCom, LLC; RNK, Inc. d/b/a RNK Telecom; Sprint Communications Company L.P.; Teleport Communications-Boston, Inc.; Teleport Communications Group; and WorldCom Technologies, Inc. be, and hereby are, DENIED; and it is

FURTHER ORDERED: That the Motion for Complaint of Global NAPs, Inc., docketed as D.T.E. 99-39, is dismissed as moot; and its is

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[15] We note that the FCC, in declaring unlawful a GNAPs reciprocal compensation tariff last year, acknowledged that GNAPs was asserting the very same issue in its April 16, 1999 Complaint that was the subject of D.T.E. 97-116. See Memorandum Opinion and Order, File No. E-99-22 at ¶ 16 (rel. Dec. 2, 1999).

FURTHER ORDERED: That parties shall have seven days from the date of this Order to file an appeal.

By Order of the Department,

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Appeal of this final Order shall be taken in accordance with applicable law. Timing of the filing of such appeal is governed by this Order and the applicable rules of the appellate body to which the appeal is made.

CERTIFICATE OF SERVICE

I, Debra Sloan, hereby certify that on this 29th day of February 2000, I caused a copy of the foregoing document File No. E-99-22 and CC Docket No. 99-354, to be sent via Hand Delivery (*) or Federal Express, to the following:

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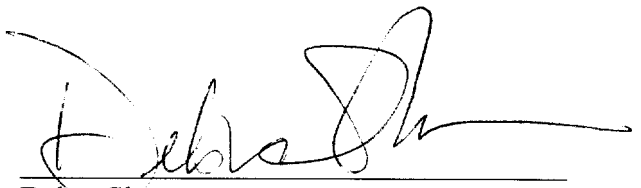

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